In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 28

FEDERAL POWER COMMISSION, PETITIONER

v.

NIAGARA MOHAWK POWER CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION ON BRIEF AMICUS CURIAE FOR THE STATE OF NEW YORK

In its brief *amicus curiae* the State of New York submits to this Court its conclusions (p. 51) that in the determination of this proceeding the Court (1) "should hold that the Niagara Mohawk Power Corporation has acquired no proprietary rights in the waters of the Niagara River under the laws of the State of New York," and (2) "should further hold that the proprietary rights of the State of New York in the waters of the Niagara River have not been superseded by Act of Congress."

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1. On the first issue, the position of the Federal Power Commission, that the rights of the respondent under New York law are highly attenuated (Br. 49–54)—far from being an "attempted slander of title" (Resp. Br. 18)—apparently did not go far enough. For the State has persuasively show, with a wealth of authority,[1] that under New York law the respondent has no right to the power use of the Niagara River.

2. On the second issue, it is clear that the State has done no more than to reargue in this case the very contentions which were rejected by this Court in *United States* v. *Appalachian Power Co.*, 311 U. S. 377, and *First Iowa Coop.* v. *Federal Power Commission*, 328 U. S. 152.[2] Indeed, it is highly significant that, with the exception of a passing reference (p. 37) to the *First Iowa Coop.* case, the State has ignored the interpretations of the Federal Power Act which this Court carefully reached, after a thorough review of all the relevant materials, in those cases. It is not the function of this Memorandum to rehearse again the legislative history and sectional

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[1] See, especially, *Niagara Falls P. Co.* v. *Water P. & C. Commission*, 267 N. Y. 265, and *Niagara Falls Power Co.* v. *Duryea*, 185 Misc. (N. Y.) 696 (*amicus curiae* brief 49–50).

[2] See also *State of Iowa* v. *Federal Power Commission*, 178 F. 2d 421 (C. A. 8), certiorari denied, 339 U. S. 979; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C. A. 2), certiorari denied, 320 U. S. 792, rehearing denied, 320 U. S. 815.

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analysis of the Act, which this Court has clearly and completely set forth on more than one occasion. We shall merely present what we conceive to be the State's fundamental theory, and show how that theory has been explicitly rejected by this Court.

The State maintains that "The Federal Water Power Act of 1920 was in form not an original act but an amendment of the General Dam Act of 1910," and that "The Act, therefore, did not make a substantial departure from previous congressional policy and administrative practice." (Br. 27, 28.) This claim is, of course, completely unsupportable in the light of this Court's square holding that the Act "was a major undertaking involving a major change of national policy." *First Iowa Coop., supra,* at 180; and see *New Jersey* v. *Sargent,* 269 U. S. 328, 334–337; *United States* v. *Appalachian Power Co., supra,* at 423–424, 427; *Federal Power Commission* v. *Idaho Power Co.,* 344 U. S. 17, 23.[3]

[3] In like manner, to say, as does the State (Br. 36), that "on almost every amendment the conservationists led by Senator Lenroot were defeated and that the group led by Senator Nelson generally succeeded in retaining its amendments in conference with the House," is to ignore the careful analysis of that history by this Court and the conclusion that the Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Coop., supra,* at 180.

Moreover, essential to the State's argument, and a necessary consequence of its position are its contentions that (Br. 2, 23) the "Federal Power Commission cannot license private corporations to use [the waters of the Niagara] without the consent of the state," and that (Br. 42) "No doubt the preservation of local rights gives rise to inconvenience of administration and division of authority. That is a penalty of the federal system." The Supremacy Clause of the Constitution aside, it is indisputable that if the *First Iowa Coop.* case decided anything, it decided that the Federal Power Act had avoided just that conflict. We can do no better than to quote from that opinion on these issues of the supposed conflict of jurisdiction and of the alleged necessity for a licensee to receive prior state approval before it can use its federal license.

* * * * *

> * * * This [solution] has resulted in a dual system involving the close integration of these powers [those of the State and Federal Governments] rather than a dual system of futile duplication of two authorities over the same subject matter. [328 U. S. at 171.]

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> * * * The resulting integration of the respective jurisdiction of the State and Federal Governments is illustrated by the careful preservation of the separate in-

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> terests of the States throughout the Act, without setting up a divided authority over any one subject. [*Id.* at 174.]
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> [Section 27] therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course. [*Id.* at 176.]
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> The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls. * * * [*Id.* at 181.]

In sum, it is clear that the State's argument proceeds upon a premise which this Court has decisively rejected.

3. The memorandum of respondent regarding the *amicus curiae* brief suggests (p. 7) that the State is here asserting claims at the eleventh hour, thus intimating some new position now taken by the State. But, in view of the lower court's holding that the respondent has water power rights which are valid under State law, the *amicus* brief merely sets forth the traditional position of the State in an attempt to dissuade

this Court from affirmance of that holding. Neither the State nor the Federal Power Commission regards the contested water power rights here as valid proprietary rights under the laws of the State.

On the other hand, the State has intimated that the Federal Power Commission took a different position in 1923. Although the quoted excerpts from the Public Papers of Governor Alfred E. Smith (Br. 15–17) do not support this suggestion, it is quite clear that the Federal Power Commission has at no time indicated that the rights of the respondent's lessors were to be recognized. The short of both these matters is that this is the first occasion, insofar as the Federal Power Commission is concerned, for definitive court adjudication of the validity of these alleged rights.

The license issued March 2, 1921, for the Niagara Falls project did not include either the Pettebone-Cataract or International Paper Company alleged water power rights here in question, as admitted by the licensee in 1947, when it sought amendment of the license to include the Pettebone-Cataract water rights expressly (R. 257, 306).[4] Article 13 of the license, for which the 1947 amendment was sought, did not include, but only referred to these rights, "if any" (R. 384).

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[4] Licensee started utilizing the so-called Pettebone-Cataract water in 1925 upon completion of new project facilities authorized by Article 7 of the license (R. 384).

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And the Commission's order of November 21, 1947, refused the amendment on the express ground that the Pettebone-Cataract interests had no rights which could be asserted against the licensee (R. 387).

Prior to 1947 there was no occasion for the Commission to question these water rights as it did in its order of September 27, 1950, here under review. This order required the respondent to set aside in an amortization reserve half of its excess earnings as required by Section 10 (d) of the Federal Power Act. During the first twenty years of operation under the license (March 1921 to March 1941), the amortization reserve provisions of Section 10 (d) of the Federal Power Act were not operative. In the interim between March 1941, the start of the amortization period, and March 1948, it was necessary to allow a period of experience to elapse in order for the licensee and the Commission to know whether the licensee had excess earnings, a portion of which should be set aside in the amortization reserve as required by Section 10 (d) of the Federal Power Act.

In this interim period the Commission determined the original cost of the project, without which excess earnings could not be determined, and the licensee challenged the validity of the Commission's findings and order requiring the cost figure to be shown on the project books of

account. The Commission's order was affirmed by the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d 787, certiorari and rehearing denied, 320 U. S. 792, 815. The first amortization reserve show cause order of the Commission directed against the licensee at Niagara Falls was issued March 16, 1948, and was superseded by a similar order issued March 15, 1949 (R. 53), which resulted in the present proceeding. The order under review covers the period from March 1941 through the calendar year 1946.

To summarize: the Commission put the respondent (and the State) upon notice in 1921 that at that time the Commission was not passing upon the validity of the rights in question within the meaning of the Federal Water Power Act, but, as the licensee stated in 1947, excluded those rights from the license; the Commission acted promptly the first time the issue was squarely put before it by the 1947 application for an amendment of the license; and the Commission acted within a reasonable time in computing the amortization reserve under Section 10 (d). There is no justification for any suggestion that, insofar as the respondent's rights to the Niagara River are concerned, either the State or the respondent

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has been misled by any action of the Federal Power Commission.[5]

Respectfully submitted.

ROBERT L. STERN,
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Federal Power Commission.

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[5] The State also attempts to suggest (Br. 40–41), that the position taken herein is inconsistent with the position taken by the Solicitor General in matters arising out of the *United States* v. *California* litigation (332 U. S. 19). It is manifest, from the very citations relied upon by the State, that there is no such inconsistency, and that the problem presented by this case is not related to those involved in that litigation.

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